LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 10 1966
JOHN F. DAVIS, CLERK

896/10

IN THE

Supreme Court of the United States

October Term, 1965

No. 896

JOSEPH ABRAMS,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL GOTTLIEB
LOUIS A. TEPPER
Attorneys for Petitioner
122 East 42nd Street
New York, N. Y. 10017

O. JOHN ROGGE
777 Third Avenue
New York, N. Y. 10017
Of Counsel

Dated January 5, 1966

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions presented	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
ARGUMENT	
Questions 1, 2 and 3	15
The Government's refusal to disclose basic relevant files constitutes a suppression of evidence; that, coupled with the denial of a hearing renders Petitioner's due process point unassailable	17
Question 4	25
Reasons for Granting Certiorari	27
APPENDIX TO PETITION:	
Opinion of United States Court of Appeals for the Second Circuit	30
Opinion of Rayfiel, D.J. Denying Motion for Writ of Error Coram Nobis	34
Statutes Involved	40

AUTHORITIES CITED

Cases

Abrams v. United States, 351 F. 2d 942, 2 Cir. (1965)	1, 14, 15
Donaldson v. United States, 264 F. 2d 804, 6 Cir. (1959)	16

PAGE

Elwert v. United States, 231 F. 2d 928, 9 Cir. (1956) 26

Gilinsky v. United States, 335 F. 2d 914, 9 Cir. (1964) 27

Heidelberg v. United States, 324 F. 2d 678, 5 Cir. (1963) 26

Helvering v. Taylor, 293 U.S. 507 (1935) 16

Holt v. United States, 272 F. 2d 272, 9 Cir. (1959) .. 26

Holland v. United States, 348 U.S. 121 (1955) 16

House v. Mayo, 324 U.S. 42 (1945) 22, 25

Jones v. United States, 282 F. 2d 745, 4 Cir. (1960), cert. denied, 365 U.S. 842 26

Kyle v. United States, 266 F. 2d 670 (2 Cir. 1959), cert. den. 361 U.S. 870 ..... 15, 25

Lawn v. United States, 355 U.S. 339 (1958) 26

Lindsey v. United States, 273 F. 2d 77, D.C. Cir. (1959) 23

Manning v. Biddle, 14 F. 2d 518, 8 Cir. (1926) 26-27

Martyn v. United States, 176 F. 2d 609, 8 Cir. (1949) 26

McKenna v. United States, 232 F. 2d 431, 8 Cir. (1956) 26

Migdol v. United States, 298 F. 2d 513, 9 Cir. (1961) 26

People v. Glass, 201 Misc. 460 (N.Y., 1952) 27

People v. Stevens, 190 Misc. 441 (N.Y., 1947) 27

Pollard v. United States, 352 U.S. 354 (1957) 27

Price v. United States, 335 F. 2d 671, 5 Cir. (1964) .. 16

Sanders v. United States, 373 U.S. 1 (1963) 23

Shafer v. United States, 229 F. 2d 124, 4 Cir. (1956) 16

Soltermann v. United States, 272 F. 2d 387, 9 Cir. (1959) 28

Stinson v. United States, 316 F. 2d 554, 5 Cir. (1963) 26

Thomas v. Cunningham, 313 F. 2d 934, 4 Cir. (1963) 25

Thomas v. United States, 271 F. 2d 500, D.C. Cir. (1959) 22-23

Townsend v. Sain, 372 U.S. 293 (1963) 23

United States v. Andolschek, 142 F. 2d 503, 2 Cir. (1944) 24

United States v. Chemical Foundation, Inc., 272 U.S. 1 (1926) 16

PAGE

United States v. Forlano, 319 F. 2d 617, 2 Cir. (1963) 22, 27
United States v. LaVallee, 319 F. 2d 308, 2 Cir. (1963) 23
United States v. Molitor, 337 F. 2d 917 (9 Cir. 1964) 16
United States v. Morgan, 346 U.S. 502 (1954) 22, 27
United States v. O'Carter, 91 F. Supp. 544, S.D. Iowa (1949) 27
United States v. O'Connor, 273 F. 2d 358, 2 Cir. (1959) 24
United States v. Plisco, 192 F. Supp. 337, D.D.C. (1961), affd. 306 F. 2d 784, D.C. Cir. (1962), cert. denied 371 U.S. 948 27
United States v. Reynolds, 345 U.S. 1 (1953) 24
United States v. Rider, 282 F. 2d 476, 9 Cir. (1960) .. 26
United States v. Schenck, 126 F. 2d 702, 2 Cir. (1942) 26
United States v. Shaw, 118 F. Supp. 849, W.D.N.Y. (1953) 27
United States v. Tribote, 297 F. 2d 598, 2 Cir. (1961) 22
United States v. Wilkins, 326 F. 2d 135, 2 Cir. (1964) 22

Walker v. Johnston, 312 U.S. 275 (1941) 23
Wickwire v. Reinecke, 275 U.S. 101 (1927) 16
Williams v. Kaiser, 323 U.S. 471 (1945) 22

Statutes

28 U.S.C. §1254(1) 1
31 U.S.C. §227 ..... 2, 14, 40

U.S. Constitution

Fifth Amendment 2, 40

Miscellaneous

Section on Taxation, American Bar Association (Jan. 1964) 12

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner applies for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit rendered October 21, 1965.

Opinions below

The opinion pronouncing the judgment of the Court below (Appendix, *infra*, pp. 30-3) is reported at 351 F. 2d 942; the opinion of District Judge RAYFIEL is not officially reported (Appendix, *infra*, pp. 34-9).

Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions presented

1. Petitioner's application for a writ of error *coram nobis* annulling judgments of conviction for tax evasion should have been granted upon his showing that the Internal Revenue Service after reaudit had officially acknowledged that Petitioner's tax returns *"as originally filed were correct"* and no further tax due; especially since the judgments of conviction were entered upon pleas of guilty given when Petitioner was unable and powerless to defend, when the amount of tax claimed admittedly was in dispute and the Court at the time of acceptance of the pleas stated:

> "I don't want him to pay a dime more than he owes. I want a sincere effort to determine the amount and I will so say." (61a)*

2. The post guilty plea final reports on reaudit that IRS sent to Petitioner officially acknowledging that his tax returns *"as originally filed were correct"* if not conclusive were at least *prima facie* proof supporting this *coram nobis*

---

* These references are to petitioner's appendix *below*; all emphases are supplied unless otherwise noted.

application; the Government's challenge as to the force and effect thereof was untenable as matter of law, and even if cognizable demanded a hearing, the denial of which was a deprivation of due process.

3. The Government's refusal to produce the underlying files and reports upon the basis of which IRS officially notified Petitioner that his returns *"as originally filed were correct"*, was an unconscionable suppression of evidence; moreover, absent a hearing (unjustifiably denied to Petitioner), all facts stated in the petition, the accompanying affidavits and exhibits, must be taken as true and all contrary statements of fact in the Government's affidavits, must be disregarded.

4. The facts showing that Petitioner's guilty pleas were not voluntary—having been compelled because he was then unable and powerless to defend—were not denied by the Government; absent a hearing, they must be accepted as true. In any event, regardless of the circumstances attendant upon his pleas of guilty, no judgments of conviction for tax evasion may stand, where IRS subsequently acknowledged and officially notified Petitioner that his tax returns *"as originally filed were correct"*, and thus no crime could have been committed.

Constitutional and Statutory Provisions Involved

The due process clause (U.S. Constitution, Fifth Amendment) and the statutory provision (31 U.S.C. §227) authorizing the withholding of payment of tax refunds where the Government has any claim against the taxpayer, whether or not adjudicated, are set forth in the Appendix to this petition (*infra*, pp. 40-1).

Statement of the Case

Petitioner Joseph Abrams served sentences and paid fines imposed in the United States District Court for the Eastern District of New York on judgments of conviction

entered on guilty pleas to two counts in two indictments alleging attempted evasion of corporate and personal income taxes for the year 1952. The alleged evasion of personal income taxes was based on the theory of *derivative liability*, —that deductions disallowed to two corporations, Fabric Garment Co., Inc. and Beekman Clothes, Inc., were received by petitioner *as constructive dividends* and constituted income to him in that tax year (21a-22a, 58a). One of the indictments, containing five counts, originated in the Southern District of New York and was subsequently transferred to the Eastern District; the other contained four counts; both involved taxes for the years 1951 and 1952 (118a, 139a-41a). At the time of his pleas Petitioner was incarcerated and serving sentence under another conviction; when the tax indictments were pressed for trial the attendant circumstances were such as to prevent adequate preparation for, much less adequate defense of, these tax indictments (59a-61a). Indeed, at the very time of sentence (Nov. 13, 1959; 58a) Petitioner challenged the tax deficiencies claimed, and the trial Judge, acknowledging that there existed a genuine dispute as to amount of tax claimed, recognized Petitioner's right to present proof in support of the tax returns as originally filed. (59a-61a)*

In 1960 prior to and after his release (May, 1961), Petitioner admittedly set about gathering the information and records for the years covered by the indictments. He also safeguarded his technical rights to challenge the Government's determination by filing a protest after receipt of 90 day letters (89a). Petitioner visited subcontractors, banks, Social Security Board offices, the New York State

---

* The Court stated:

> "I don't want him to pay a dime more than he owes. I want a sincere effort to determine the amount and I will so say." (61a)
>
> "Among the conditions of the probation will be a requirement that he pay his entire tax obligation to the Government, as covered by count 3 of the indictment No. 45336, *mindful of the fact that there is a dispute as to the amount of that tax obligation.*" (61a)

Unemployment Insurance Department, examined business records of various companies, the records of various judicial and Congressional proceedings and obtained supporting affidavits. Important original records relating to the business of Fabric were located in an attorney's office; as a result Petitioner was able to verify original schedules relating to the cost of sales for Beekman and Fabric for the years 1951 and 1952 (62a).

On the basis of the foregoing IRS conducted an extended reaudit of Petitioner's personal returns and the *consolidated returns* of Beekman and Fabric for the years *1951* and *1952* (89a). In the course of this reaudit, Petitioner presented hundreds of documents to IRS agents for their examination. There were numerous conferences had between Petitioner, his agents and IRS personnel (103a).*

---

* Petitioner pointed out: "In view of the fact that Mr. Blacher has been investigating Fabric, Beekman and other affiliated companies as well as myself for some 12 years, his affidavit does not adequately recite all the work that he did and all the investigation and checking that he performed during that period of time. I know, for example, that he has omitted reference to hundreds of details of his minute examination of the records relating to the taxpayers involved, to his conferences with Special Agents as well as persons employed on my behalf such as Joseph Baradel, Joseph Recht and others. Surely Mr. Blacher must remember the two Special Agents, Corcoran and Downey, of the Intelligence Service of the United States Treasury, both of whom spent a large part of three years between 1953 and 1957 examining checks, invoices, brokerage statements and many other documents relating to the financial dealings of Fabric and Beekman as well as of the stockholders, officers, subcontractors and suppliers of those companies. In addition, those Special Agents made a minute and detailed examination of my personal financial transactions and when those examinations were completed Messrs. Corcoran and Downey compared the results of their audit with the investigations of the Special Agents of the Treasury Department in New Jersey who had made a similar examination of Kravitz and his companies such as Kraven Park Clothes. In addition the FBI examined my records. *The U.S. Attorney in Brooklyn still has some of Fabric's records and, indeed, they should now be produced in connection with this proceeding.* All of those investigative reports and records were available to Mr. Blacher when he made his last audit which resulted in the reports dated February 4, 1963 and June 15, 1965—the reports which form the foundation for this application." (103a-4a)

This reaudit extended over a period of years. The examination was primarily processed by Harry Blacher, Field Audit Group Supervisor for IRS, in charge of 12 Internal Revenue Agents (87a) and a member of the staff of IRS for upwards of 17 years. *It was Mr. Blacher's report that initially furnished the basis for this criminal prosecution of Petitioner* (89a)! Not only did Blacher himself conduct the reaudit, but acknowledged in his affidavit *submitted below by the Government*:

> *"That this audit resulted in my reversing my findings of the audit which was the basis of a criminal prosecution against Mr. Abrams."* (89a)

The report of IRS Agent Blacher was in turn reviewed by Leo Gellens, a *senior reviewer* in the Manhattan District of IRS, *who admittedly had "acted in such capacity for a period of 17 years"* (96a); also by Alex Denkenson in the service of IRS for some 18½ years and admittedly "assigned to the *Review Section* for a period of approximately 15 years" (97a-8a).

Following such reaudit IRS determined that for both 1951 and 1952 Petitioner's tax returns were substantially *correct "as originally filed"* and that no additional tax was due. *Specifically, as to the corporate return, based on Petitioner's claim for refund (filed in June 1963), it was found that for the tax year 1951 there had actually been an overassessment of $19,896.85* (Exh. opp. 66a, at p. 2); *as to Petitioner's personal income tax return for that same year there was a specific finding that there had been an overassessment of $18,388.06* (Exh. opp. 68a at p. 2). Petitioner received the *official communication* set out below (p. 6, *infra*) which specifically notes that his *"tax returns as originally filed were correct"* and, moreover, that he is entitled to the return of the incidental fraud penalty assessed against him.

It is especially important to note that such determination was admittedly reached by this official as he himself states after *"examination of all records submitted by taxpayers."* *

---

* "U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
OFFICE OF THE DISTRICT DIRECTOR

95 Church Street
White Plains, N. Y. 10601

May 21, 1964

Mr. Joseph Abrams
33 Great Neck Road
Great Neck, New York

In Re: Beekman Clothes Inc. (Parent)
Harold Hyman
Joseph Abrams

Dear Sir :

In reply to your letter dated May 15, 1964 in which you request status of the claims for refund filed by above noted taxpayers, the following information is submitted:

The claims as filed requested refund of income tax and fraud penalties assessed per revenue agent report dated February 4, 1963 as follows:

Name	*Years*	*Tax*	*Penalty*
Beekman Clothes Inc.	1951	$19,896.85	$20,564.93
Harold Hyman	1951	5,247.69	2,700.41
Joseph Abrams	1951	18,388.06	10,115.10

Examination of all records submitted by taxpayers revealed that the refunds as claimed are properly due the taxpayers in full, showing that the tax returns as originally filed were correct. However, it is not within the jurisdiction of the Manhattan District of the Internal Revenue Service to recommend refund of fraud penalties which were previously assessed as a result of a year under indictment. Therefore, the undersigned is recommending a refund of the Income Taxes assessed in full for the year 1951 while abatement of the fraud penalties cannot be recommended at this level. A statutory notice of claim disallowance as pertains to the fraud penalty will be issued upon submission of the revenue agent's report.

/s/ HARRY BLACHER
Harry Blacher
Internal Revenue Agent"
(Exh. opp. 64a).

About a month later on June 15, 1964 further *official notification* was sent by the *"District Director"* to Beekman and Fabric as well as to Petitioner with regard to these very tax years, covering the indictment counts dismissed as well as those upon which the challenged guilty pleas were taken; each *official notification* enclosed a "Report of examination" with attached detailed schedules (see Exhs. opp. 66a, 68a). The report to Beekman and Fabric showed the basis upon which IRS determined that these companies had in fact sustained a *taxable loss of* $107,354.59 for the period January 1, 1952 through August 15, 1952 a sum *in excess* of that originally shown on the corporate returns (see Exh. opp. 66a at p. 6, Sched. 3 thereof); the *schedules contain specific confirmation of the overassessment* of $19,896.85 made against Beekman for 1951 listed in Revenue Agent Blacher's prior communication (see Exh. opp. 64a and pp. 1 and 5 of Exh. opp. 66a). The *official notification* and schedules sent to Petitioner *confirm the overassessment* of $18,388.06, likewise listed in Revenue Agent Blacher's communication (see Exhs. opp. 64a and 68a, "Preliminary Statement"). Each exhibit indicates "Name of examiner Harry Blacher" and "date of report 2/5/64". Since the District Director's *official letters of transmittal* are both dated June 15, 1964, it is apparent that they were not hastily sent; indeed, the schedules themselves reflect deliberate consideration.*

---

* Note, for example, the following from the Beekman-Fabric report:

"Name of Taxpayer—

BEEKMAN CLOTHES INC. & FABRIC GARMENT CO. INC.
Schedule No. or Exhibit—1A
Year Ended—12/31/51

A—Cost of Goods Sold	49,150.44
To allow additions to cost of goods sold as follows *due to proper submission of proof by T/P*	

(continued on page 8)

The schedules attached to the report sent to Petitioner contain specifics of like nature (see "Preliminary Statement" and p. 2, sched. 1A of Exh. opp. 68a).*

(continued from page 7)

Beekman		Fabric
19,911.34	1. A/C's Receivable Redetermination	6,360.59
3,750.00	2. Liquidating Damages	—
	3. Retirement Pay	5,000.00
	4. Home Work—A. Leonetti	1,000.00
	5. Navy Refund Claims	3,767.40
	6. Payroll—Model Clothes	9,361.11
23,661.34		25,489.10
	Total—Beekman and Fabric	49,150.44

B—Legal Fees — 7,500.00
Portion of 12,500.00 paid to 1952 properly accruable for 1951 services performed—Fabric.

C—Taxes — 932.25
Additional Federal Unemployment Insurance Assessment for 1951.—Fabric

D—Net Operating Loss Carryback — 24,355.23

1952 Carryback per RAR	$ 82,999.36
As Corrected—See Sch #	107,354.59
Add'l Carryback	24,355.23

"

(see: pp. 3-4 sched. 1A, of Exh. opp. 66a; we will supply here, as we did below, more legible replicas, rather than handwritten as in the originals.)

---

* We quote from the 1963 official report to Petitioner:

"Form 843 timely filed by taxpayer was duly considered in body of this report. *Overassessment* due to reduction of dividend income attributable to taxpayer from Beekman Clothes Inc. and Fabric Garment Co. Inc. in which Mr. Abrams was a majority stockholder and officer." (*See "Preliminary Statement"*)

* * *

"Dividend Income — 29,725.02
To reduce amount of dividend income to zero in line with findings in RAR submitted concurrently covering Beekman Clothes Inc. and Fabric Garment Co. Inc.

Per Prior RAR	29,725.02
As Corrected	-0-
Decrease	29,725.02

"

(See, Schedule 1A of "Explanation of Items", Exh. opp. 68a)

More than a year earlier on March 5, 1963 an *official notification* had been given to Petitioner covering adjustments then allowed for the years 1950, 1951 and 1952. The report is indicative of the perseverence with which Petitioner sought a complete reaudit promptly after he was released. To that report there were likewise attached specific schedules noting precisely what findings were then reversed and the basis thereof (see "Explanation of Items" sched. 3A, p. 7 of Exh. opp. 70a).*

The correctness of the corporate and individual tax returns as originally filed was thus substantiated by specific references in the *official* documents that emanated from IRS; the only item disallowed to Petitioner involved $1,524.42 paid for legal expenses which the Bureau determined was deductible by the corporation rather than by him, but which involved "no fraud penalty" (62a; p. 8 of Exh. opp. 70a).

---

* Note that the corporate and individual tax returns were keyed into each other; also, the specific reference to submission of proof.

"EXPLANATION OF ITEMS

SCHEDULE 3A

YEAR ENDED 12/31/52

JOSEPH AND EVE ABRAMS

A—Capital Gains To reverse findings of prior RAR due to changes made in examination of corporate return of Beekman Clothes Inc. and Fabric Garment Co. which when revised showed no capital gains attributable to taxpayer.	$44,379.13
B—Capital Loss To reinstate capital loss originally claimed by taxpayer and disallowed in prior RAR.	$ 1,000.00
C—Miscellaneous Expenses To allow legal expenses *substantiated by taxpayer through checks to named payees.*	$ 2,500.00
D—Depletion Allowance To allow *proven allowance* per advice from Noah Petroleum Corp."	$ 1,062.50

(sched. 3A, p. 7 of Exh. opp. 70a)

Indeed, in April, 1963 Petitioner received a refund from IRS for $27,508.63 to which there was added interest of $5,553.38 (Exh. opp. 142a). Petitioner, in a letter that acknowledged receipt of the check "representing an overpayment of the personal income tax for Joseph and Eve Abrams for the years 1951-1952" and made specific reference to Beekman and Fabric "for which Joseph and Eve Abrams were not liable as stockholders or directors", complained about not having received interest on the refund and more important, requested "a reply in writing as I wish to communicate with Federal Judge RAYFIEL to acquaint him with this situation" (144a). The official communication sent by "*District Director*" Thomas E. Scanlon in reply, set forth a schedule "concerning the application of payments made on your account and on the account of Beekman/Fabric Corp." noting that:

> "Refunds in the amounts of $27,508.63 and $5,533.38 have been issued. These amounts represent the *overpayment of tax* and the interest on the overpayment" (145a-6a).

We emphasize, it was not until June, 1964, the year following, that the further official notifications already alluded to were sent clearing up all phases of the matter.

During this entire period preceding Petitioner's application for *coram nobis* (Mar. 5, 1963-Oct. 14, 1964 [57a]), there was never any suggestion by the Government disavowing the official communications sent to Petitioner which confirmed the correctness of the corporate and individual tax returns involved in the convictions here sought to be annulled.

Revenue Agent Blacher in his initial report (July 9, 1957) for this prosecution "made a finding of a tax deficiency of $907,334.82 for the year ending December 31, 1951, and for the period of January 1, 1952 to August 12, 1952 a tax deficiency of $22,336.64" (88a); his "*supplemental* audit of Joseph Abrams, Beekman Clothes, Inc. and Fabric Gar-

ment Co., Inc." began "in the latter part of 1960" and, as already noted, continued through 1964 (89a; Exhs. opp. 64a, 66a, 68a).

Admittedly "this audit resulted in my [Revenue Agent Blacher's] reversing my findings of the audit which was the basis of a criminal prosecution against Mr. Abrams" (89a).

In its brief below (p. 3) the Government argued "[i]t tries the limits of credulity to believe that a man with seventeen years experience as an Internal Revenue Officer in a supervisory capacity could and would accept without further examination and investigation unverified and unauthenticated records" submitted by a taxpayer he knew had been convicted on a plea of guilty as to the very matters involved in, and as a basis for reversing, prior findings this Agent himself had made. We fully agree. That was the precise position taken by Petitioner's counsel before Judge RAYFIEL* (37a-8a).

Anyone having had the slightest contact with IRS knows that tax refunds, especially when substantial in amount, are not granted without the closest scrutiny and unless there was complete processing of the taxpayer's claim and proof in support thereof, through the many official

---

* "Mr. Gottlieb: Your Honor, let me say this final word to ease Mr. Gillen's mind. Not only is the burden of proof upon the one seeking coram nobis to establish the rectitude of his position—I don't deny that—but I also claim that the same burden of proof to a greater degree existed upon the taxpayer when he asked for a complete refund. In other words, when he came before the Internal Revenue agents to say that there was nothing due, he had to convince them beyond a reasonable doubt, and anyone who denies it doesn't know what takes place when you try to rectify a position and say they were wrong in having indicted him in the first instance, and the conviction was erroneous. In order to get a conclusion that is directly opposite to what his plea of guilty shows, not only did he have the burden of proof, he had to convince responsible officials beyond a reasonable doubt. And I want the documentary proof before His Honor to show that he has already met that burden, and he couldn't get away with it unless he did. They wouldn't do it otherwise." (37a-38a)

levels and channels through which a refund application necessarily must pass. The most meticulous scrutiny must have been applied where the taxpayer was criminally prosecuted and convicted on his own plea as to the very matters involved. Indeed, before the official communications were prepared and issued, as already noted (pp. 5-10, *supra*), this matter must necessarily have passed from the Internal Revenue Agent to the Review Section, thence through the Post Review Section, approved by the Fraud Section, and finally passed on by the District Director's Office (96a-8a, 103a, 115a).*

The Government understandably was at a loss to disown the earlier payment made of "refunds in the amounts of $27,508.63 and $5,533.38" representing "overpayment of tax and the interest on the overpayment" as noted in the District Director's letter to Petitioner of May 1, 1963 (145a-6a). The Government's brief below (p. 5) dismissed such payments as "immaterial" although the refund *involved these very tax years upon which the indictments were founded.* Even more perplexing was Judge RAYFIEL's ruling that he didn't want to hear "anything relating to the 1951 returns" (15a) as to which the Government had initially charged a tax evasion of $907,334.82 but with respect to which it was ultimately acknowledged that Petitioner's

---

* In a bulletin distributed by the Section on Taxation of the American Bar Association (Jan. 1964) it was pointed out: *"All revenue agents' reports, before being sent to taxpayers, are reviewed for accuracy and completeness by the Review Staff.* Occasionally the examining agent and the reviewer will differ as to the proper disposition of an item or adjustment or the reviewer may propose a new adjustment. In such cases, the examining officer states his position in writing and the matter, if still in dispute, is referred to the Chief of the Field Audit Branch. If the matter cannot be resolved at that point, it is finally resolved by the Chief of the Audit Division.

In these cases the Service declines to grant the taxpayer or his representative a conference to discuss the matter with the reviewer or his superior. *The taxpayer can only be certain that an agreed case has cleared the Review Staff when he receives a revenue agent's report."*

tax returns *"as originally filed were correct."* (Exh. opp. 64a)* The opinion below states:

> "Abrams relies on affidavits and documents showing that Blacher, the revenue agent, had on a further reaudit reversed some of his earlier findings as to corporate expenditures, resulting in a finding of a refund due to Abrams of taxes and penalties, in-

---

* The record shows: "Mr. Gottlieb * * * The other counts which referred to the year 1951 were dismissed. And in fairness to the Court since there is an erroneous impression which the Government, Mr. Armstrong, received as to the relevancy of the year 1951; obviously our treatment of that year in the papers, although the counts were dismissed, your Honor, is to indicate that even though they were dismissed, there was no imposition on the Court in getting a dismissal of two counts with respect to a year which the Court might not have dismissed if there was fraud involved. * * * The Court: Why should this Court be concerned with tax years which were not involved in either of the counts which he pleaded? Mr. Gottlieb: Because we wanted to demonstrate to your Honor that there was no imposition on the Court. For example, let's assume that with respect to the year 1951, which is one of the counts that your Honor dismissed, and as to which fraud penalties had been imposed by the Internal Revenue, then we would have been in this untenable position, we would have gotten a dismissal from the Court as to the year 1951 as to which—let us assume we were in no position to attack the fraud charges—and then the Government would have been in this position, they would have consented to a dismissal of counts which inherently involved fraud and accepted pleas of guilty as to counts which we can now demonstrate beyond dispute that defendant was innocent. * * * The Court: *I regard anything pertaining to the '51 returns as not relevant to the motion that is before me.* This is a motion that is addressed to a sentence and we are concerned only with the tax years involved in those counts of the indictment to which he pleaded guilty." (12a-13a). After further colloquy the Court adhered to this ruling: *"The Court: I state to you now that I don't [want] to hear anything relating to the 1951 returns. He pleaded guilty to an evasion of taxes for the year 1952, and you will have to confine yourself to that.* Mr. Gottlieb: Now, I assume that since the Government counsel raises no objection, he acquiesces in that position, so therefore I will not make any further statement on the record than I have." (15a). Government counsel Mr. Armstrong, persisted in having 1951 ruled "not relevant"; the record shows:

> "Mr. Armstrong: * * * *I believe your Honor ruled that these checks would be relating to 1951 and they are not relevant?*
>
> *The Court: If the checks relate to '51, they are out."* (47a).

cluding those for the year in question. *Such a reaudit report was in fact made, and checks for refund based thereon apparently drawn but not issued.*" (Appendix, p. 32, *infra;* 351 F. 2d at p. 943)

We pointed out that the additional refund checks were not sent to Petitioner because of Government civil litigation then pending against Petitioner; refund payments may be withheld even though the validity of the Government claims has not been adjudicated (see 31 USC §227; Appendix, *infra,* pp. 40-1).* Obviously tax year 1951 as well as 1952 necessarily involved the integrity of the initial audit made by Revenue Agent Blacher and the subsequent reaudit which *admittedly* resulted in the reversal of his findings for these two years (89a).

---

* Shortly before this *coram nobis* application was made Petitioner received the following communication specifically stating the reasons why the refund checks were *being withheld;* it will be noted that no question was raised as to *payment of the refunds, only as to time of payment:*

"U.S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

In Reply Refer to
CP:C:CA

OCT 29 1964

Mr. Joseph Abrams
33 Great Neck Road
Great Neck, New York.

Dear Sir:

Your letter of October 2, 1964 addressed to the District Director of Internal Revenue, New York, New York, in which you request information regarding *an overpayment of income tax for the year 1951,* was forwarded to us for consideration.

The U. S. Department of Justice advised us that there is now pending a civil action entitled United States v. Fabric Garment Co., Inc., et al, and, since you are one of the defendants, requested that *payment of any tax refund be withheld* until such time as a decision is rendered.

In view of the above, action on your tax refund may not be completed until a decision is made in the above-mentioned case.

Very truly yours,

/s/ JOHN M. SMITH
Chief, Centralized Activities Office
Collection Division"

Questions 1, 2 and 3

The official acknowledgements by Internal Revenue Service confirming the correctness of Petitioner's tax returns for the years covered by the indictments and moreover certifying that *Petitioner was entitled to refunds,* required the granting of the writ of error *coram nobis* annulling the judgments of conviction for tax evasion.

(a) The official Government communications to that effect if not conclusive, certainly *prima facie* supported issuance of the writ, especially in view of the Government's refusal to disclose basic relevant files, as demanded. The rulings sanctioning the withholding of such records and the denial of a hearing were violations of due process.

(b) The holding below that the official Government communications verifying the correctness of Petitioner's tax returns were merely "conclusory" and hence nugatory, *as matter of law,* is in direct conflict with settled authority and sets up an indefensible double standard of administering justice.

The opinion below recognized the validity of our contention that "[w]ithout a hearing facts alleged by a movant would ordinarily be taken as true" citing, as we did, *Kyle* v. *United States,* 266 F. 2d 670 (2 Cir. 1959), cert. den. 361 U.S. 870; however, that doctrine the Court said did not apply to "mere conclusory allegations" (Appendix, p. 33, *infra;* 351 F. 2d at p. 944); we so concede. The Court ruled "what Abrams had the burden of demonstrating was the true condition of the corporate earnings for the year in question from which both charges flowed, not Blacher's conclusions from statements made by interested secondary sources" (Appendix, p. 32, *infra;* 351 F. 2d at pp. 943-4).

Petitioner did not rest on the allegations of his petition, which mere inspection indicates are factual and well documented (61a-70a, 100a-107a, 114a-117a, 142a-149a). Buttressed by Internal Revenue Agent Blacher's acknowledged reversal of his prior findings against this taxpayer as the result of his reaudit, and by the subsequent official Government communications of the District Director himself, certifying the correctness of Petitioner's tax returns, certainly a *prima facie* case supporting the issuance of the writ was established, *which could not constitutionally be overcome without a hearing.*

United States v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 [1926], voices the firmly settled doctrine that "[t]he presumption of regularity supports the official acts of public officers and in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties" (see also *Donaldson* v. *United States*, 264 F. 2d 804, 807, 6 Cir. [1959]). There is a "presumption of administrative regularity" (*United States* v. *Molitor*, 337 F. 2d 917, 923-4 [9 Cir. 1964]); that is, "in the absence of clear evidence to the contrary" it is presumed "that official action taken has been duly exercised" (*Shafer* v. *United States*, 229 F. 2d 124, 129, 4 Cir. [1956]). More important "the rule is well established in civil cases that the computation made by the Commissioner shall be presumed correct" (*Price* v. *United States*, 335 F. 2d 671, 678, 5 Cir. [1964]). In short, "the determinations of the Commissioner have prima facie validity" (*Holland* v. *United States*, 348 U.S. 121, 126 [1955]; see also *Wickwire* v. *Reinecke*, 275 U.S. 101, 105 [1927]; *Helvering* v. *Taylor*, 293 U.S. 507, 515 [1935]). Manifestly, the computations and determinations need not be made by the Commissioner himself in order that the presumption of administrative regularity apply, because as *Shafer, supra* indicates "[t]he Supreme Court has pointed out that in many situations it is impossible for a head of a

department to perform in person all the duties imposed upon him by his office" (p. 129).

Internal Revenue Agent Blacher, as already noted, was a Field Audit Group Supervisor, Leo Gellens, a senior reviewer in the Manhattan District; so too was Alex Denkenson long in service in the Review Section (97a). All were veterans in IRS, whose activities preceded and formed the basis for the official communications sent to Petitioner by the District Director of IRS (pp. 5-10, *supra*).

The Government's refusal to disclose basic relevant files constitutes a suppression of evidence; that, coupled with the denial of a hearing renders Petitioner's due process point unassailable

Petitioner's counsel subpoenaed the files of IRS "relating to audits and refund claims of Joseph Abrams, Eve Abrams, Fabric Garment Co., Inc. and Beekman Clothes, Inc. relating to the years 1951 and 1952, together with any checks or record of checks payable to any of the aforementioned" and also "working papers and reports of agents" relating to the official communications sent to Petitioner (137a-8a). On argument a file was produced; disclosure thereof was resisted by the Government and access thereto, denied to Petitioner (48a). Judge RAYFIEL retained the file for the declared purpose of determining whether it contained any material supporting the petition. The record makes that clear with stark significance (53a-5a)*.

---

* "The Court: Let me state just what I want. The claim is made by Mr. Gottlieb that there are reports in the files of the Internal Revenue Service, and possibly your office now, which would indicate that there were no taxes due from Mr. Abrams for the period 1952; more specifically for the period covered by the two counts of the indictment to which he pleaded guilty. If there are such papers, which are let us say exculpatory of Mr. Abrams, he wants me to have them, and I want them, and that is all I want, nothing else.

"Mr. Armstrong: In other words, your Honor, if the Government in our determination comes to the conclusion that the papers with respect to 1952 do not indicate that Mr. Abrams is exculpated, that we are—

"The Court: Let me determine that, and I don't think you will have any trouble.

The file was of crucial importance in view of the Government's claim, advanced for the first time in opposition to Petitioner's *coram nobis* application, that the reaudit and the official computations, determinations, and communications already alluded to, were without proper foundation, unauthorized and based upon unverified records (83a-99a). This, notwithstanding that at least a year and a half earlier, in the course of the reaudit, IRS paid to Petitioner the refund check of $27,508.63 with interest of $5,533.38 (p. 10, *supra*); and moreover, as the opinion below noted, "[s]uch a reaudit report was in fact made" and additional "checks for refund based thereon apparently drawn but not issued" (p. 14, *supra*). Responding to the belated claim that the reaudit and the computations, determinations and official communications issued during its progress and as a result thereof, were without adequate foundation, Petitioner detailed the records submitted to Revenue Agent Blacher (103a-4a; p. 4, *supra*). Indeed, the schedules themselves here quoted only in part (pp. 7-9, *supra*) expressly refer "*to proper submission of proof by T/P*" (p. 7, *supra*).

"Mr. Armstrong: I want to make sure. You want the papers relating to any such claims?

"The Court: That's right. For instance, there has been a reference made here to a letter and accompanying report by Blacher of an over-assessment or whatever the characterization of it was. If you have any papers which would support and substantiate that or enlarge on it, I would like to have them.

"Mr. Armstrong: What I will do, your Honor, is I will submit these documents to the people in Internal Revenue who are familiar and expert with them and give them your Honor's direction, and have them take out the papers that they feel are responsive. I myself, frankly, some of these papers I don't even know what they are. They are notes.

"The Court: Rather than do that, I would rather assume the burden of passing upon them myself. I don't want the Internal Revenue Service to give me papers which they think might be exculpatory, because that is my function; that is my responsibility. I want to pass on it. And if I have to go through a number of documents which are not relevant in order to reach a conclusion, I am willing to do it." (54a-55a)

Moreover Agent Blacher verifies that he "conducted this audit in a normal, routine manner" and that "*[t]he retention of the aforesaid records by me and the forwarding of these records on to the Review Section was not unusual*" (94a). Leo Gellens, Senior Reviewer in the Manhattan District, a year earlier admittedly "reviewed the Revenue Agent's Report submitted by Harry Blacher, dated February 4, 1963 in connection with his examination of Joseph & Eve Abrams and Beekman Clothes Inc. and Fabric Garment Co. Inc. and Harold and Dinah Hyman for the years 1950, 1951 and 1952. *The revenue agents report came into the Review Staff and submitted to me about February 4, 1963 by my Group Supervisor* (whose name I do not know at this time" (96a). Petitioner in a letter dated March 22, 1963 addressed to Mr. Gellens requested return of "all the exhibits which I [Petitioner] supplied to the Internal Revenue Service in the case of Fabric Garment Co., Inc. for the years 1951 and 1952" (149a). Petitioner's representative called for and "received a large packet of papers from Mr. Gellens for which I signed a receipt" (148a). Revenue Agent Blacher on the other hand, admitted receiving such records from Petitioner and states "I forwarded these records to the Review Section along with my report" and that the "records submitted to the Review Section were in an accountant's bound ledger book, *with the supporting documents stapled to the pages*" (93a).

The matter ultimately was assigned to Alex Denkenson *another official in the Review Section.* It was admittedly his function to determine whether "a particular factual determination violates the Rules of the Internal Revenue Service" and more important, whether "a factual determination is made without adequate explanation"; if neither is the case "he accepts the Internal Revenue Agent's factual determinations" (97a). Alex Denkenson, in the Review Section for a decade and a half, in his affidavit for

the Government acknowledged, that *"on or about March 4, 1964, I was assigned to review* a Revenue Agent's supplemental report of an audit of the Beekman Clothes, Inc. and Fabric Garment Co. Inc. for the periods covering the tax year 1951, and for the period from January 1, 1952 to August 15, 1952" which report "was submitted by Revenue Agent Harry Blacher and *that said report reversed the findings of a previous audit report of the same corporations for the same years conducted by Mr. Blacher, to the extent of eliminating the tax liability and fraud penalty"* (98a).

With the record in this posture, production and disclosure of the basic IRS file subpoenaed by Petitioner was essential not only to establish that Agent Blacher's reaudit and the subsequent review thereof, by seasoned Government personnel was carefully processed, but more notably to demonstrate the untenability of the Government's claim that the documentary proof submitted by Petitioner was "accepted without verification or investigation" by any and all of them (83a).* Notwithstanding that Judge RAYFIEL unequivocally declared he personally would examine the subpoenaed file "because that is my function; that is my responsibility. I want to pass on it" (55a; p. 18, *supra*), as revealed in his correspondence with Petitioner's counsel, whatever records were made available, if examined, were

---

* The Government's contentions only pinpoint the need, as stated by counsel below:

> "to produce these records which we have subpoenaed and which are not in court, which show that before they issued a letter of this kind with respect to a man who undertook a plea of guilty, in the very nature of things the closest and most careful and most meticulous scrutiny would necessarily have to be made before they acknowledged that the Government was wrong." (8a)

not considered by him (127a-132a)!* Moreover Judge RAYFIEL refused to sign Petitioner's proposed order that the file "remain in the custody of the Clerk of this Court pending applicant's appeal" (135a). A file was submitted by government counsel to the Court of Appeals on oral argument; we have no means of knowing what it contained nor does its opinion state that the file was examined or considered (Appendix pp. 30-3 *infra*). There was no disclosure of its contents to Petitioner's counsel. What occurred here,

---

* Petitioner's counsel wrote Judge RAYFIEL (Dec. 15, 1964) "we respectfully request an opportunity to examine 'the applicable files and records of the Internal Revenue Service' referred to in your Honor's opinion to which we have never been given access" (127a). Judge RAYFIEL replied (Dec. 17, 1964) "My opinion referred only to those records of the Internal Revenue Service which were specifically mentioned in the opinion" (128a). Petitioner's counsel then wrote Judge RAYFIEL (Dec. 21, 1964):

> "In the affidavit of defendant Abrams, sworn to December 2, 1964, the following appears:
>
> 'I therefore earnestly ask the Court to examine the Government file which was submitted to the Court on the argument of this application and all of the other related documents to see whether or not they reflect what had actually taken place on the basis of which the letter of May 21, 1964 was sent to me. If there is no such correspondence in the file, we respectfully ask that at the very least the Court promptly issue its directive that such correspondence be supplied to the Court so that the Court can have a full documentary record before it makes its determination, especially since the full documentary record was initially subpoenaed by me.'
>
> Since the 'applicable files and records of the Internal Revenue Service' referred to in your Honor's opinion were not made available to us for inspection at any time, obviously we have no means of knowing whether or not 'a full documentary record' of the Internal Revenue Service was presented to the Court. In any event, it is manifest that before any order is submitted for settlement we must be in a position to inspect the files that were submitted to the Court so that we may intelligently identify 'the applicable files and records of the Internal Revenue Service' which the foregoing excerpt from your Honor's opinion indicates was considered in rendering the determination that was made." (130a)

We quote in full Judge RAYFIEL's reply (Jan. 5, 1965):

> "Replying to your letter of December 21st I beg to state that the statement 'applicable files and records of the Internal Revenue Service' referred only to those documents the originals or copies of which were contained in your moving papers and in the papers submitted in opposition to the motion." (132a)

to say the least, was "the equivalent of suppression" (*United States* v. *Wilkins*, 326 F. 2d 135, 141, 2 Cir. [1964]), a violation of due process that was aggravated by the denial of a hearing, even though the Government itself had suggested that a hearing be had (85a).

Government counsel urged that Petitioner should "prove his case by a full presentation to the Court of the documents and transcripts of testimony alleged to have been given to Mr. Blacher" and that Petitioner and others "should be called to the stand to testify" (85a). Petitioner's response was "[w]hile I believe it to be unnecessary, I am prepared and have always been prepared to re-submit such proof as may be necessary to reaffirm the conclusion reached by Mr. Blacher" and "I am not adverse to a complete and open hearing if the Court should deem it necessary" (106a). And finally, after reference to "the full documentary record" that "was initially subpoenaed by me", Petitioner rightfully referred to the "great reluctance on the part of the Government to supply all the facts" and concluded "my application should therefore be granted" or "at the very least a hearing should be directed at which all the facts can be elicited" (117a).

In a proceeding for a writ of error *coram nobis*, petitioner is entitled to a hearing if a material issue of fact exists (*United States* v. *Tribote*, 297 F. 2d 598, 603-4, 2 Cir. [1961]). Moreover, since Petitioner's application was denied "without a hearing we must assume that the Petitioner's allegations are true" (*House* v. *Mayo*, 324 U.S. 42, 45 [1945]; *Williams* v. *Kaiser*, 323 U.S. 471, 473-4 [1945]; *United States* v. *Forlano*, 319 F. 2d 617, 619, 2 Cir. [1963]). These controlling principles govern applications for writs of error *coram nobis* as well as *habeas corpus* (*Tribote, supra*, p. 601; *United States* v. *Morgan*, 346 U.S. 502 [1954]; *Thomas* v. *United States*, 271 F. 2d 500, 503 D.C.

Cir. [1959]). If the files and records of the case do not "*conclusively show*" that petitioner is "entitled to no relief" it is error to deny the application without a hearing (*Lindsey* v. *United States,* 273 F. 2d 77, D.C. Cir. [1959]; see also *Townsend* v. *Sain,* 372 U.S. 293 [1963]; *United States* v. *LaVallee,* 319 F. 2d 308, 2 Cir. [1963]). *LaVallee, supra,* holds that "petitioner cannot be denied a hearing because the facts asserted by him are contradicted" by the "prosecuting officers for it is this denial which creates the factual issue to be resolved" (p. 312). Indeed this Court (*Walker* v. *Johnston,* 312 U.S. 275 [1941]) condemned the practice of deciding applications for writs of habeas corpus "on ex parte affidavits and without the taking of testimony" holding that "the only admissible procedure" is to direct a hearing upon which petitioner "would have the burden of sustaining his allegations by a preponderance of evidence"; this Court observed that "denials only serve to make the issues which must be resolved by evidence taken in the usual way" and moreover that such issues may not be determined "by the pleadings and the affidavits but by the whole of the testimony", and more notably even where petitioner's "allegations are improbable and unbelievable" that "cannot serve to deny him an opportunity to support them by evidence" (pp. 285-7). *Sanders* v. *United States,* 373 U.S. 1, 22-3 [1963] holds that the District Court should not restrict itself to "grounds narrowly alleged" but should conduct a broad inquiry into the facts which might justify the writ. The denial of a hearing, coupled with the non-disclosure of the subpoenaed IRS file and the failure to give consideration thereto, is clearly a denial of due process.

The suppression of the file itself suffices to sustain this point. While it may be "lawful for a department of the government to suppress documents even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in

a criminal prosecution, founded upon those very dealings to which the documents relate *and whose criminality they will, or may, tend to exculpate*" (*United States* v. *Andolschek*, 142 F. 2d 503, 506, 2 Cir. [1944]). Judge LEARNED HAND in *Andolschek* makes it clear that where the issue involves guilt or innocence there is an end to "*any confidential character the documents may possess*". If the Government chooses to "leave the transactions in the obscurity from which a trial will draw them", it will not be permitted to assert that they are not exculpatory. More important, the Court may not "draw any line between documents whose contents bear directly upon the criminal transactions, and those which may be only indirectly relevant" because "[n]ot only would such a distinction be extremely difficult to apply in practice, but the same reasons which forbid suppression in one case forbid it in the other, though not, perhaps, quite so imperatively" (p. 506).

The rulings below, we respectfully submit, sanction suppression and make a mockery of due process. They run counter to the adjudicated cases and indeed are opposed to the ruling of the same Court in *United States* v. *O'Connor*, 273 F. 2d 358, 2 Cir. [1959] holding quite plainly "that the agents' reports relating to" a taxpayer's "asset, income and expenditure position during the entire tax period in question, whether prepared for criminal or civil tax purposes", may be necessary to the taxpayer's preparation and conduct of his case if for no other reason than certainly "to determine whether any statements of fact therein were inconsistent with or contradictory to" the affidavits here submitted by the IRS officials (p. 360); the Government may not resist production of its files "by any claim of a sovereign right to secrecy of reports or methods of computation" (p. 361).

We paraphrase *United States* v. *Reynolds*, 345 U.S. 1, 12 (1953),—since the Government has the duty to see that

justice is done, it is unconscionable to allow it to challenge the verity of the reversal of the findings made against Petitioner resulting from the reaudit and reflected in the official communications and reports sent Petitioner and then invoke its Governmental privileges to deprive Petitioner of anything which might be material to sustain his right to the writ here sought.

Question 4

Absent a hearing, the facts (even if denied and they were not) showing that Petitioner's guilty pleas were not voluntary—having been compelled because he was unable and powerless to defend (58a-60a)—must be accepted as true (*Thomas* v. *Cunningham,* 313 F. 2d 934, 4 Cir. [1963]; *Kyle* v. *United States,* 266 F. 2d 670, 2 Cir. [1959], cert. denied 361 U.S. 870; *House* v. *Mayo,* 324 U.S. 42, 45 [1945]). Moreover, regardless of the setting in which the pleas were taken, no judgments of conviction for tax evasion may stand in view of the subsequent official acknowledgment by IRS after reaudit, that the tax returns "as originally filed were correct" and thus that no crime could have been committed.

Petitioner alleged, and it was undenied, that he was incarcerated at the time these tax indictments were being brought to trial (58a-59a), and, as the sentencing Judge himself recognized, that there was a genuine "dispute as to the amount" of his tax obligation (61a); nor was it denied that the subsequent reaudit began in 1960 prior to Petitioner's release, and continued through 1964 when IRS issued the official notifications already alluded to, which acknowledge that the tax returns, the basis of this criminal prosecution, "as originally filed were correct". Petitioner's application for a writ of error *coram nobis* promptly followed (pp. 5-14, *supra*).

As an indispensable element to sustain a judgment of conviction for tax evasion "it must be shown that income tax was actually due from the accused for the year involved" (*Holt* v. *United States,* 272 F. 2d 272, 278-9, 9 Cir. [1959]; accord *Lawn* v. *United States,* 355 U.S. 339, 361 [1958]; *Jones* v. *United States,* 282 F. 2d 745, 4 Cir. [1960], cert. denied, 365 U.S. 842). The authorities are legion holding that "the Government must prove not only an attempt wilfully to defraud it *but also that a tax in addition to what the taxpayer has already paid remains due and owing*" (*United States* v. *Schenck,* 126 F. 2d 702, 704, 2 Cir. [1942]; see also *McKenna* v. *United States,* 232 F. 2d 431, 8 Cir. [1956]; *Elwert* v. *United States,* 231 F. 2d 928, 9 Cir. [1956]; *Heidelberg* v. *United States,* 324 F. 2d 678, 679, 5 Cir. [1963]).

By its official notifications to Petitioner IRS having acknowledged, that as the result of the reaudit there was a reversal of the prior finding of alleged tax evasion and that the tax returns "as originally filed were correct", and Petitioner having received official confirmation that his claimed refunds had been approved in full (64a) and an interim refund in the substantial sum of $27,508.63 plus interest of $5,333.38 having been paid in the course of the reaudit two years prior to the bringing of the application for *coram nobis* (pp. 5-14, *supra*), it necessarily follows under the authorities cited, that the facts essential to support a judgment of conviction for tax evasion did not exist, and hence no such crime was or could be committed. In that situation the judgments of conviction are without foundation in fact or in law and should and must be annulled even though entered on pleas of guilty (*Stinson* v. *United States,* 316 F. 2d 554, 555, 5 Cir. [1963]; *Migdol* v. *United States,* 298 F. 2d 513, 515, 9 Cir. [1961]; *Martyn* v. *United States,* 176 F. 2d 609, 8 Cir. [1949]; *United States* v. *Rider,* 282 F. 2d 476, 9 Cir. [1960]; *Manning* v. *Biddle,*

14 F. 2d 518, 8 Cir. [1926]). The authorities uniformly hold that a judgment of conviction, although entered on a plea of guilty, will be set aside when there exists factual error "of fundamental character such as rendered the conviction, judgment and sentence of defendant irregular and invalid" (*United States* v. *Shaw,* 118 F. Supp. 849, 852 W.D.N.Y. [1953]) and "when it is clear that manifest injustice will result if the motion is not granted" (*Gilinsky* v. *United States,* 335 F. 2d 914, 917, 9 Cir. [1964]; see also *United States* v. *O'Carter,* 91 F. Supp. 544, S.D. Iowa [1949]; *People* v. *Glass,* 201 Misc. 460 [N.Y., 1952]). As tersely stated in *People* v. *Stevens,* 190 Misc. 441, 442 [N.Y., 1947], "a person cannot plead guilty to facts which are harmless and innocent and thereby subject himself to imprisonment".*

Reasons for Granting Certiorari

This case presents a frightening and disquieting example of the "majestic vindictiveness" of Government in its refusal to correct or even grant a hearing as to official error, officially acknowledged. Absent countervailing proof, an official computation, determination and notification to the taxpayer by IRS of a deficiency is in itself sufficient to support a judgment of tax liability (*United States* v. *Plisco,* 192 F. Supp. 337, D.D.C. [1961], affd. 306 F. 2d 784 D.C. Cir. [1962], cert. denied 371 U.S. 948). It is noteworthy that *the same official communication* is not only designed to notify a taxpayer as to a *"deficiency"* but equally important, also as to an *"overassessment"* (Exhs. opp. 66a,

* A *coram nobis* application was proper as a means of obtaining annulment of the convictions. (*United States* v. *Morgan,* 346 U.S. 502 [1954]; *United States* v. *Forlano,* 319 F. 2d 617, 2 Cir. [1963].) *Pollard* v. *United States,* 352 U.S. 354, 358 [1957], decrees that the "collateral legal disadvantages" of judgments of conviction demand disposition of Petitioner's application on the merits. *Coram nobis,* said this Court, in *Morgan,* is applicable when facts are presented that "affect the 'validity and regularity' of the judgment" (p. 507).

68a, 70a); these exhibits show that *in the same document which may, as here, treat with several tax years,* identical official notifications and supporting schedules of line adjustments issue, indicating whether there is a *"deficiency"* or *"overassessment"* in a particular tax year (Exhs. opp. 68a, 70a).

The decision below necessarily has a broad impact upon taxpayers generally in that it sets up an untenable double standard of administering justice, i.e., failing to give the same evidentiary weight, force and effect to an official computation, determination and notification of an *"overassessment"* that would be given in the identical official notification to the taxpayer of a *"deficiency"*. Worse yet, the holding below brings about the bizarre result that the official computation, determination and notification when it concerns an "overassessment" favorable to the taxpayer does not even rate a hearing whereas the identical document when it concerns a "deficiency" adverse to the taxpayer is given an evidentiary weight, force and effect sufficient to establish tax liability and, as matter of law, adequate to support a judgment against the taxpayer (pp. 16-17, 27, *supra*).

No such unconscionable result should be permitted by this Court. Indeed, although we need not go to that length, it may well be argued that the burden here rested upon the Government to prove that the computations, determinations and official notifications favorable to Petitioner and the refunds actually made and allowed were erroneous (cf. *Soltermann* v. *United States,* 272 F. 2d 387, 9 Cir. [1959]).

The Government's brief below, in asserting that "[i]t tries the limits of credulity to believe that a man with *seventeen years experience as an Internal Revenue Officer in a supervisory capacity* could and would accept without further examination and investigation unverified and un-

authenticated records submitted by a convicted felon" (Gov.'s Court of Appeals br., p. 3) only validates our contention that it was a clear violation of due process to have denied a hearing. Nothing short of a hearing can serve to determine whether the official computations, determinations, notifications and refunds admittedly made and allowed by such long experienced supervisory officials were due to perfunctory investigation, predicated upon "unverified and unauthenticated records."

Elementary constitutional safeguards,—and that is of crucial importance to the granting of certiorari by this Court,—cannot permit taxpayers to be subjected to the double standard created by the rulings below. The questions presented are of major importance to the administration of justice to taxpayers in their relationship with the Internal Revenue Service and, more important, with respect to tax procedures with which they are constantly confronted.

Petitioner's application for certiorari should be granted and the determination below reviewed by this Court; as an alternative, we respectfully suggest that this proceeding be summarily remanded for the holding of the hearing sought by and unconstitutionally denied to Petitioner.

Dated January 5, 1966

Respectfully submitted,

SAMUEL GOTTLIEB
LOUIS A. TEPPER
Attorneys for Petitioner
122 East 42nd Street
New York, N. Y. 10017

O. JOHN ROGGE
777 Third Avenue
New York, N. Y. 10017
Of Counsel

APPENDIX TO PETITION

Opinion of United States Court of Appeals for the Second Circuit

(Argued September 21, 1965 Decided October 21, 1965.)

JOSEPH ABRAMS,

Appellant,

—v.—

UNITED STATES OF AMERICA,

Appellee.

Before:

MOORE, SMITH and ANDERSON,

Circuit Judges.

Appeal from denial in the United States District Court for the Eastern District of New York, Leo F. Rayfiel, *District Judge,* of motions to set aside judgments of conviction for tax evasion, to withdraw pleas of guilt and to dismiss the indictments. Affirmed.

SAMUEL GOTTLIEB, New York, N. Y. (Gainsburg, Gottlieb, Levitan & Cole, and Stephen A. Lefkowitz, New York, N. Y., on the brief), *for appellant.*

MICHAEL J. GILLEN, Assistant United States Attorney, Eastern District of New York (Joseph P. Hoey, United States Attorney, Eastern District of New York, on the brief), *for appellee.*

Opinion of United States Court of Appeals for the Second Circuit

SMITH, *Circuit Judge*:

Joseph Abrams served sentences and paid fines imposed in the United States District Court for the Eastern District of New York on judgments of conviction based on guilty pleas to two counts alleging attempted evasion of corporate and personal income taxes for the year 1952. Thereafter he moved to set aside the judgments, withdraw the pleas, and dismiss the indictments. The Court, Leo F. Rayfiel, *Judge,* denied the motions and Abrams appeals. We find no error and affirm the denial of the motions.

Abrams, a formerly practicing accountant, was the principal stockholder and active head of a corporation largely engaged in clothing manufacture for the government. Concededly, for one reason or another, large payments purportedly to subcontractors and suppliers were incorrectly made out and paid to others than those named on the checks and books. After an original Internal Revenue audit for 1951 and 1952 was under way and recommendation was made by Blacher, the auditing agent, that the taxpayer's figures be accepted, special agents of the intelligence unit entered the picture, an investigation was had, indictments were obtained and Abrams entered guilty pleas to two counts of attempted evasion of corporate and personal income tax, based on the year 1952. Other counts were dropped. Abrams was sentenced to a term of imprisonment concurrent with a term he was then serving on another charge, fined and placed on probation to follow the imprisonment. One of the conditions of probation was that he clear up the corporate and individual tax liability when it should be finally determined. Abrams paid or deposited some $93,000 to assure the carrying out of his undertaking to see that the taxes were paid. Reaudit indicated a total amount due of some $65,000 which was credited to the tax-

payer's accounts, and the balance with interest repaid by check to Abrams. Abrams later filed claim for refund.

Abrams relies on affidavits and documents showing that Blacher, the revenue agent, had on a further reaudit reversed some of his earlier findings as to corporate expenditures, resulting in a finding of a refund due to Abrams of taxes and penalties, including those for the year in question. Such a reaudit report was in fact made, and checks for refund based thereon apparently drawn but not issued. The record is somewhat confused by the fact that, as mentioned above, other checks had been received by Abrams for a repayment with interest of a portion of the moneys deposited by him at the time of sentence to guarantee payment of the tax eventually found to be due, after credit to the corporate and individual tax accounts of some $65,000 in taxes, penalties and interest for 1951 and 1952, from the amount so deposited. Government affidavits purported to demonstrate that the latest Blacher reaudit was without substantial foundation, based largely on unsubstantiated schedules and statements of Abrams and the record of Abrams' testimony in another trial.[1] In this situation the court was justified in the conclusion that Abrams had failed to make a sufficient showing of availability of evidence to demonstrate that no tax was in fact due to require a hearing on his motions.

After all, what Abrams had the burden of demonstrating was the true condition of the corporate earnings for the year in question, from which both charges flowed, not Blacher's conclusions from statements by interested secondary sources. Without a hearing, facts alleged by a

---

[1] See *United States* v. *Kravitz*, 281 F. 2d 581, 583, 3 Cir. 1960, esp. fn. 3, likening Abrams and Kravitz to the principals in the "Highwayman's Case."

movant would ordinarily be taken as true, but not mere "conclusory allegations." *Kyle* v. *United States,* 266 F. 2d 670, 2 Cir. 1959, cert. den. 361 U. S. 870 (1959). Abrams, who had the best opportunity to know the facts, and was represented by counsel, had entered guilty pleas. His claims now that the pleas were involuntary because of other charges pending are not supported, and his claims that the tax was not due rely on Blacher's apparent conclusions, not on any showing of the existence of any solid underlying proof. The court was correct in holding that he has failed to make a sufficient showing of probability of error in the tax calculation to require either the issuance of a writ of error *coram nobis* or a hearing thereon. The denial of the motions is affirmed.

Opinion of Rayfiel, *D.J.* Denying Motion for Writ of Error Coram Nobis

RAYFIEL, J.

On October 9, 1959 the defendant pleaded guilty to Count 4 of a 4-count indictment (No. 45336), which count charged him with having evaded income taxes for the year 1952 in the amount of $29,374.04, in that he submitted a false joint income tax return on September 15, 1953 wherein he reported a net income of $27,402.27, with tax due in the amount of $8,073.12, whereas the true net income was $83,967.80, with tax due thereon in the amount of $37,447.16.

On October 13, 1959 he pleaded guilty to Count 2 of a 5-count indictment filed in the United States District Court for the Southern District of New York, and transferred to this District (No. 45026) under Rule 20 of the Federal Rules of Criminal Procedure, which said count charged him and a co-defendant therein named with having evaded corporate income taxes in that on August 22, 1952 they submitted tax returns for Beekman Clothes, Inc. (Beekman) and Fabric Garment Company (Fabric) for the period between January 1, 1952 and August 15, 1952 reporting at net loss of $98,370.51, with no tax, whereas the true consolidated net corporate income was $12,358.47, with tax due in the amount of $3,954.71.

On November 13, 1959 the defendant was sentenced to imprisonment for two years on his plea under indictment No. 45336, the sentence to run concurrently with a federal sentence which he was then serving at Lewisburg, Pennsylvania, and to imprisonment for two years on his plea under indictment No. 46025. The execution of the latter sentence was suspended, and the defendant was placed on probation for a period of one year under certain conditions not here pertinent. In addition the Court imposed a fine of $10,000 on each count, which have been paid.

Opinion of Rayfiel, D.J. Denying Motion for Writ of Error Coram Nobis

The defendant now moves to vacate and set aside the said judgments of conviction and the sentences imposed thereunder, and for leave to withdraw his pleas of guilty. His application, incorrectly denominated as made under Section 2255 of Title 28, United States Code, and Rules 32(d) and 35 of the Federal Rules of Criminal Procedure, will be treated as a proceeding in the nature of a Writ of Error Coram Nobis.

It is the defendant's contention that at the time he entered the aforementioned pleas of guilty he was so beset by the serious problems and pressures in which he was then involved, including other charges then pending against him or threatened, the unavailability of the books and records of Beekman, Fabric and other subcontractors which were absolutely indispensable for the establishment of his innocence, and the Government's announced intention to press the instant case for trial that, feeling it would be futile to proceed to trial, he decided to plead guilty.

The defendant insists that neither he, Beekman or Fabric evaded the payment of any income taxes for the period covered by the counts to which he entered pleas of guilty, and that after his release from confinement under the aforementioned sentences he succeeded in locating books of account and other records of various subcontractors which established his innocence of the crimes herein involved, as a result of which he "was finally able to convince the Internal Revenue Service that the original tax returns filed" on his behalf and on behalf of Beekman and Fabric "had been substantially correct and entirely free of fraud" and that the Internal Revenue Service agreed that he "was entitled to a refund personally and that for the year 1952 the corporations had suffered a loss of $107,354.59."

In support of his claim he has submitted substantially in excess of one hundred pages of affidavits, correspondence and other documents, which, except for those hereinafter referred to, are, in the light of what follows, impertinent to the issues raised by this application. The gist of his claim rests on four letters written to the defendant or to Beekman and Fabric by the Internal Revenue Service, one dated March 5, 1963, another dated May 21, 1964, and the remaining two dated June 15, 1964. Only the letter dated May 21, 1964 is sufficiently definitive to warrant consideration. That letter, addressed to the defendant, refers to the defendant, his co-defendant, and Beekman and states, in substance, that an examination of the taxpayers' records reveals "that the refunds as claimed (by them) are properly due . . . in full". That letter is the crux of the defendant's claim to relief herein. It was signed: "Harry Blacher, Internal Revenue Agent."

Blacher's affidavit, verified November 5, 1964, and submitted by the Government, states, *inter alia*, that on May 12, 1952 he was assigned to examine the tax returns of Beekman and Fabric for the years 1951 and 1952 and that he began a routine audit thereof on July 21, 1952, during the course of which he discussed adjustments thereof with the defendant; that on April 30, 1953 the Intelligence Division of the Internal Revenue Service requested the Audit Division, in which he was employed, to cooperate in the investigation of the 1951 and 1952 tax returns of the defendant and the said corporations, which resulted in the aforementioned indictments and pleas of guilty.

He states further that in a report made by him on July 9, 1957 he made a finding against the said taxpayers of a tax deficiency of $907,334.82 for the calendar year 1951 and a tax deficiency of $22,336.64 for the period between Janu-

ary 1, 1952 and August 15, 1952, which said deficiencies were based upon the disallowance of certain fictitious payments to alleged subcontractors and non-deductible expenses. His said findings were based upon files of the Internal Revenue Service and reports of Intelligence Agents.

In the latter part of 1960 Blacher made a supplemental audit of said tax returns during the progress of which he met with representatives of the taxpayers, and later with the defendant. Following such audit he reversed his findings of July 9, 1957, upon which the criminal prosecution of the defendant was based. The reversal, he states, was grounded on certain books and records, and on transcripts of the testimony of the *defendant* in the trial of the case of United States vs. Kravits in the U.S. District Court of New Jersey, and the testimony of one Nat Rosen before a Congressional Committee which had matters herein involved under investigation. Blacher admitted that in making such supplemental audit he made no effort to verify the authenticity of the documents submitted to him in connection therewith, although he knew that the audit involved returns which were the basis of the counts of the aforementioned indictments to which the defendant had pleaded guilty. He accepted, and acted upon, records, documents and representations by the *defendant* without verification or substantiation by bank statements, cancelled checks, or otherwise.

Among the affidavits submitted by the Government in opposition to the motion were those of James J. Corcoran and Francis M. Downey, both Special Agents attached to the Intelligence Division in the Manhattan District of the Internal Revenue Service. Corcoran's affidavit states in part that in April, 1953 he initiated an investigation into the income tax liability of the defendant, Beekman and

Fabric and that Downey and Blacher worked with him on the matter; that upon its completion he and Downey submitted a report of their findings, showing substantial tax evasion by those involved herein by means and devices set forth at some length in his affidavit; that the books and records of Beekman and Fabric were not made available for his inspection, the defendant, stating that they had been destroyed in a fire. Corcoran states further that he has reread his investigative report, upon which Blacher based his original findings, the latter's affidavit, submitted herein, his (Blacher's) report, reversing his original findings, and the more than one hundred pages of affidavits, records and documents submitted by the defendant in support of his motion, and finds no basis therein for changing his original report and findings in any way whatsoever. He states also that in or about February, 1964 Blacher telephoned him, requesting that the Intelligence Division agree to remove the fraud penalty assessed against the defendant despite the Statement of Policy enunciated by the Commissioner of Internal Revenue which provides that,

> "No civil penalty recommended by the investigating agent for any tax period shall be removed on the district level if that penalty arises from a tax charge regarding which the taxpayer was indicted or regarding which he was the subject of a criminal information."

It may be implied that Blacher, by reason of his long affiliation with the Internal Revenue Service, was familiar with the said Statement of Policy. The request was denied. Downey's affidavit is corroborative of Corcoran's as to all material matters.

Opinion of Rayfiel, D.J. Denying Motion for Writ of Error Coram Nobis

It may be added that, as appears from the affidavit of Samuel P. Gray, Assistant Chief of the Audit Division of the Manhattan District, Blacher had no "authority to issue or sign in his name or on behalf of the District Director" the aforementioned letter of May 21, 1964.

In the light of the foregoing, particularly the affidavits of Corcoran, Downey and Gray, and the applicable files and records of the Internal Revenue Service, I am satisfied that the defendant has failed to establish his right to the relief sought herein, and, accordingly, his motion is in all respects denied.

This opinion will constitute the findings of fact and conclusions of law herein.

Settle order on notice.

Dated: December 10, 1964

LEO F. RAYFIEL
United States District Judge

Statutes Involved

United States Constitution—Fifth Amendment

No person shall * * * be deprived of life, liberty, or property, without due process of law.

Federal Statute—31 U.S.C. § 227

§ 227. Offsets Against Judgments Against United States

When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the

balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff. Mar. 3, 1875, c. 149, 18 Stat. 481; Mar. 3, 1933, c. 212, Title II, § 13, 47 Stat. 1516.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 896

JOSEPH ABRAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

During 1958 two federal indictments were filed against petitioner in New York, one charging him with attempted evasion of his personal income taxes for the years 1951 and 1952, and the second charging him with evasion of corporate income taxes for the same years (R. 58a, 73a, 105a, 139a–142a). A third federal indictment, filed in New Jersey, charged petitioner and two other persons with evasion of the taxes of still another corporation for the year 1951. *United States* v. *Kravitz*, 281 F. 2d 581 (C.A. 3). Not long prior to the return of these three indictments, petitioner had been found guilty of stealing property of the United States

213-598—66

and had been sentenced to imprisonment for 30 months. This conviction was ultimately affirmed on appeal, and this Court denied certiorari. See *United States* v. *Fabric Garment Co.*, 262 F. 2d 631 (C.A. 2), certiorari denied, 359 U.S. 989. In October, 1959, petitioner pleaded guilty to two counts involving tax evasion for the year 1952 charged in the New York indictments (R. 12a, 58a, 73a, 118a). Although petitioner protested that he did not owe the *full* amount of tax deficiencies then being asserted by the government, it is clear that he did intend to admit, by his guilty pleas, that he had evaded a *substantial* amount of taxes (R. 14a, 61a). He was sentenced to imprisonment for two years, to run concurrently with the 30 months stolen property sentence he was already serving, fined a total of $20,000, and the remaining seven counts of the two New York indictments were dismissed (R. 118a).[1]

On October 14, 1964, after his release from prison, petitioner instituted the present proceeding by filing, in the Eastern District of New York, a motion to set aside his guilty pleas and conviction, which the court treated as a petition for a writ of error *coram nobis* (R. 57a, 119a). Petitioner asserted that the conviction was a manifest injustice since he was able to show that neither he nor the corporations had any substantial tax deficiencies for the years involved in the indictments (R. 58a-64a). In support of this contention he submitted a letter and three reports

[1] As to the third indictment in New Jersey, petitioner obtained a severance and testified for the government against his co-defendant Kravitz (R. 59a). The case against petitioner was ultimately dismissed.

prepared by Internal Revenue Agent Harry Blacher, who had participated in the original investigation in 1952–1953, and who had now concluded, after further investigation during 1963–1964, that there was no substantial understatement of taxes and no fraudulent conduct on the part of petitioner (R. 65a–71a).

The government opposed petitioner's motion (R. 83a–86a), and submitted in support an affidavit by Agent Blacher in which he admitted that, when first assigned to the case in 1952, he had recommended a refund upon the basis of books and records submitted by petitioner (R. 88a–89a); that, after Intelligence Agents joined the investigation, he reversed himself and recommended assessment of large tax deficiencies on the basis of evidence developed by the Intelligence Agents (R. 88a–89a); that, as a result of his supplemental investigation begun in 1960, he submitted additional reports again reversing himself and finding no substantial deficiencies, relying solely upon unverified documents submitted to him by petitioner[2] (R. 89a–94a); and that he had forwarded these documents to the revenue officials who were to review his supplemental reports (R. 93a, 94a). The revenue officials who reviewed Blacher's supplemental reports submitted affidavits to the effect that no supporting documents accompanied the reports (R. 96a–98a). The Intelligence Agents, who had worked with Blacher in the original investigation and had then

[2] During the original investigation petitioner insisted that some of these documents had been destroyed by fire (R. 109a). He now explained that he had not produced them at that time because they would have incriminated Kravitz (R. 95a).

recommended prosecution of petitioner, submitted affidavits to the effect that, in 1964, Blacher asked them to reverse their finding of fraud; that they refused to do so; and that Blacher's supplemental reports contained no evidence which would cause them to alter their original recommendations (R. 108a–113a).

The district court concluded that petitioner had failed to establish his right to relief and denied the motion to vacate the conviction (Pet. 34–39; R. 118a–123a). The court of appeals affirmed (Pet. 30–33).

The instant petition for a writ of certiorari, filed January 10, 1966, would appear to be out of time. The judgment of the court below was entered on October 21, 1965 (Pet. 30), and, since a *coram nobis* proceeding "is a step in the criminal case," *United States* v. *Morgan,* 346 U.S. 502, 505, fn. 4, the petition should have been filed within 30 days. By the same test, the appeal itself was untimely, for the order of the district court was entered on December 10, 1964 (Pet. 39; R. 123a), and the notice of appeal was not filed until March 19, 1965, long after the 10 days allowed by Rule 37(a)(2), Federal Rules of Criminal Procedure. In any event, the petition is without merit.

Relief by *coram nobis* should be granted only for errors of the "most fundamental character." *United States* v. *Morgan,* 346 U.S. 502, 509, 512. "Continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under

circumstances compelling such action to achieve justice." *United States* v. *Morgan*, 346 U.S. at 511. Petitioner's request for vacation of his guilty pleas and conviction rests upon two contentions: (1) that at the time of plea and sentence he was "unable and powerless" to present a defense (Pet. 1, 3, 25; R. 59a–61a); and (2) that the Internal Revenue Service has now officially admitted that he had no substantial tax deficiencies for the years involved in the indictments (Pet., passim; R. 61a–64a). We submit that petitioner failed to make any showing of manifest injustice, and that the district court correctly concluded (Pet. 39; R. 123a) that he had failed to establish his right to the relief sought.

(1) There is nothing in the record to support petitioner's assertion that he was forced to plead guilty because the circumstances prevented adequate preparation for trial. Petitioner states (Pet. 3) that, at the time of the guilty pleas in October 1959, he was already incarcerated on the earlier stolen property conviction. But the first of the three income tax indictments was returned in March 1958, and petitioner admits that he did not go to jail on the stolen property charge until after this Court had denied certiorari in May 1959 (R. 60a). He thus had ample time to collect pertinent documents and to prepare a defense.

Nor can it be claimed that petitioner did not understand the import of his guilty plea. As an accountant he was well versed in financial affairs. He was represented by competent counsel and had, in another

criminal case pending at about the same time, fully prosecuted his legal rights by taking an appeal from his criminal conviction and then applying to this Court for a writ of certiorari. Moreover, it is apparent that petitioner consciously decided that it would be to his advantage to plead guilty to one count each from the two federal indictments in New York and to cooperate with the government in the prosecution of Kravitz on the federal indictment in New Jersey, for the latter indictment was ultimately dismissed as to him as were the seven other counts in the two New York indictments. Finally, petitioner undoubtedly understood that his guilty pleas constituted an admission that he had evaded a substantial amount of tax (R. 14a, 61a).

(2) Nor has petitioner shown that there was no substantial tax deficiency for 1952, the year for which he pleaded guilty of tax evasion. Although Revenue Agent Blacher's 1963–1964 reports indicate that there was no tax due for 1952 and the Internal Revenue Service, in reliance upon these reports, refunded to petitioner the amounts it had collected from him after his guilty plea, Blacher conceded in his affidavit that his reports were based solely upon unverified documents submitted to him by petitioner (R. 89a–95a). Affidavits from the Intelligence Agents who had worked on petitioner's case show that the documents relied upon by Blacher were patently insufficient to prove that petitioner had no substantial

deficiency for 1952 (R. 108a–113a). Judge Rayfiel found (Pet. 37):

> Blacher admitted that in making such supplemental audit he made no effort to verify the authenticity of the documents submitted to him in connection therewith, although he knew that the audit involved returns which were the basis of the counts of the aforementioned indictments to which the defendant had pleaded guilty. He accepted, and acted upon, records, documents and representations by the defendant without verification or substantiation by bank statements, cancelled checks, or otherwise.[3]

Blacher also admitted that he had at one time purchased stock in a corporation in which petitioner had an interest (R. 94a–95a). Moreover, the Assistant United States Attorney who prepared the government's answer stated that he found Blacher "very difficult to work with * * * evasive and equivocal" (R. 84a). Although not shown in the record, Internal Revenue Service files disclose that Blacher resigned from the Service during an investigation of his conduct in this case and that the Service has rescinded all action taken in reliance on Blacher's reports and is now attempting to re-collect substantial deficiencies from petitioner for 1952.

Judge Rayfiel, who had imposed sentence upon petitioner and who was thus thoroughly familiar with

---

[3] Furthermore, it was apparent that petitioner had told conflicting stories about the existence of these documents and his reason for not relying upon them instead of pleading guilty. See *supra*, p. 3, fn. 2.

the background of the case, properly decided (Pet. 37–39) that action taken by the Service in reliance on Blacher's reports would not justify the conclusion that petitioner's previous plea of guilty had been a manifest miscarriage of justice. As this Court held in the *Morgan* case, relief by *coram nobis* should be granted only under compelling circumstances. Certainly, in the circumstances of this case, the trial court was entitled to deny such extraordinary relief where it had concluded that petitioner's evidence was insufficient to show that there was actually no substantial 1952 deficiency. As the court of appeals stated, petitioner's allegations depend solely on Blacher's questionable reports, "not on any showing of the existence of any solid underlying proof" (Pet. 33). In the absence of such a showing, the district court was not required to hold a further hearing. See *Taylor* v. *Alabama*, 335 U.S. 252, 261–263, 271–272; *United States* v. *Campbell*, 278 F. 2d 916, 918–919 (C.A. 7); *Bateman* v. *United States*, 277 F. 2d 65, 67–68 (C.A. 8).[4]

[4] Petitioner also complains that the district court failed to make available to him certain files of the Internal Revenue Service relating to audits and refund claims of petitioner and his corporations. At the hearing petitioner's attorney stated that he merely wanted the files "placed in the possession of the Court, not in my possession"; "I want the Court to have them. I am not interested in looking at them" (R. 34a, 31a). The district court complied with this request (R. 53a–55a, Pet. 17), and petitioner cannot now complain that the district court did not afford him relief he did not request.

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
JOSEPH M. HOWARD,
JOHN M. BRANT,
Attorneys.

APRIL 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 19 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 896

RECEIVED
APR 19 1966
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JOSEPH ABRAMS,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

SAMUEL GOTTLIEB
LOUIS A. TEPPER
Attorneys for Petitioner
122 East 42nd Street
New York, N. Y. 10017

O. JOHN ROGGE
777 Third Avenue
New York, N. Y. 10017
Of Counsel

Dated April 14, 1966

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

REPLY MEMORANDUM FOR PETITIONER

The Government concedes in its brief that the official reports of IRS indicate "that there was no tax due for 1952", the year upon which judgments of conviction for tax evasion were entered, that IRS "in reliance upon these reports, refunded to petitioner the amounts it had collected from him after his guilty plea" and further that IRS concluded that there was "no fraudulent conduct on the part of petitioner" (Govt. Mem., pp. 6, 3). But, the United States concludes, even these official findings and the substantial cash refund made thereon do not compel a hearing on the question of whether petitioner owed no taxes for the year named in the indictments because, it contends, these official acknowledgments were based "upon unverified documents" which were "patently insufficient to prove that petitioner had no substantial deficiency for 1952" (Govt. Mem. pp. 6-7). To buttress its position the Government relies, as did the courts below, upon ex parte affidavits of IRS Intelligence Agents who did not participate in the supplemental audits which resulted in the finding that petitioner owed no taxes for 1952, but who at a subsequent date "read the papers" submitted by petitioner in support of his application for writ of error *coram nobis* and those of the Government submitted in opposition on the basis of which they "found no basis for changing [their] original findings" (109a-110a, 112a-113a).

The Government manages to ignore, however, the following salient facts: that the reports which found "no tax due" from petitioner were prepared by Revenue Agent Blacher, an IRS Field Audit Group Supervisor of eighteen years experience, who had made the prior audits which resulted in petitioner's indictments and convictions (87a-88a); that these reports were thereafter reviewed by Leo Gellens, a "Senior Reviwer in the Manhattan District" for "about seventeen years" (96a) and by Alex Denkenson, an Internal

Revenue employee for "some eighteen and one-half years" who had been assigned to the Review Section for "approximately fifteen years" (97a); that both of these experienced officials of IRS passed upon and approved the Revenue Agent's report which Mr. Denkenson himself noted "reversed the findings of a previous audit report * * * to the extent of eliminating the tax liability and fraud penalty" (98a); that at no time did either of these officials reject or question the Revenue Agent's report on the ground that it was based upon unverified documents, nor did they question any single finding on the ground that there was further verification needed although one of Mr. Denkenson's specific functions was to determine whether "a factual determination is made without adequate explanation" (97a); that both of these experienced IRS officials fully accepted and approved Revenue Agent Blacher's supplemental audits which "resulted in my reversing my findings of the audit which was the basis of a criminal prosecution against [petitioner]" (89a), although it was plainly noted that the finding that petitioner's "tax returns as originally filed were correct" related to "a year under indictment" (Exh. opp. 64a); and that, before petitioner could receive the substantial cash refunds which were admittedly made to him by IRS, the matter must necessarily have passed after review by agents Gellens and Denkenson, to the Post Review Section, been approved by the Fraud Section and finally passed upon by the District Director's Office.

We have said before and are compelled to repeat that it is not credible that all of the foregoing painstaking review by these various levels of IRS, resulting in the payment of *substantial cash refunds* to petitioner could have occurred, without the least question being raised, if the finding "that there was no tax due for 1952" had been based on "unverified documents" as the Government now claims on this proceeding.

Moreover, the Government's contention that the supplemental audit was based upon "patently insufficient" documents was hotly disputed below. Petitioner stated that he had supplied Agent Blacher with detailed documentation in support of the deductions previously disallowed (103a-104a), which petitioner offered to resubmit to the District Court at a full hearing of the matter (104a, 106a, 117a). In his sworn affidavit elicited and submitted by the Government, Blacher stated as follows:

> "Portions of the aforesaid records were submitted to me by Mr. Abrams and left with me by Mr. Abrams, and I forwarded these records to the Review Section along with my report. * * * These records submitted to the Review Section were in an accountant's bound ledger book with the supporting documents stapled to the pages." (93a)

Petitioner submitted the affidavit of Murray Berman who stated that at petitioner's request in March, 1963, he had gone to the office of IRS at 484 Lexington Avenue, New York City, where he picked up a large packet of papers from Revenue Agent Leo Gellens (147a-148a), who, as already noted, reviewed Agent Blacher's reports. Annexed to the Berman affidavit was a letter from petitioner to IRS, attention of Mr. L. Gellens, in which return of the Exhibits supplied by appellant was requested (149a), and in response to which Agent Gellens did return to Mr. Berman the documents which had been submitted to IRS.

Now, three years after official acknowledgment by IRS that petitioner owed no taxes for the years named in the indictments, and three years after substantial refunds had been made on the basis of those acknowledgments (142a-146a), during which period no question was raised by anyone as to the propriety of either the IRS notifications or the cash refunds, the United States claims that petitioner has not even the right to a hearing on the question of

whether the IRS finding was not the result of careful and deliberate consideration of a fully documented record.

We submit that if there was anything irregular about the conduct of Revenue Agent Blacher, or about the supplemental audits he conducted which "resulted in my reversing my findings of the audit which was the basis of a criminal prosecution against Mr. Abrams" (89a), as the Government has implied,* or if indeed there were irregularities throughout the entire IRS review structure which approved those audits and the refunds made thereon, this matter can be brought out only through a hearing and cannot be resolved upon the ex parte affidavits of other government officials. *Walker* v. *Johnston,* 312 U.S. 275, 285-7

---

* In its memorandum the Government stresses that:

1. Blacher admitted that he had once "purchased stock in a corporation in which petitioner had an interest";
2. The Assistant United States Attorney who elicited Blacher's affidavit found him "very difficult to work with"; and
3. Although not shown in the record, Blacher has allegedly resigned from IRS which has "rescinded all action taken in reliance on Blacher's reports and is now attempting to recollect substantial deficiencies from petitioner for 1952" (Mem., p. 7).

In his affidavit below, petitioner denied that he had anything whatsoever to do with Blacher's investments in any corporations and that the investment which Blacher claimed to have made came at a time when Blacher's audit showed that petitioner owed many hundreds of thousands of dollars in taxes on the basis of which he was subsequently indicted and convicted (104-106). As to the assertion that a Government witness was "difficult to work with", we can only say that this further emphasizes the need for a full hearing on this matter. Nor should the Government's attempt to institute further proceedings against petitioner for alleged deficiencies for the year 1952 deny him a hearing. It may be noted that late last year the Government levied two jeopardy assessments against Mr. Abrams, one for $1,406,834.25 and the other for $230,428.43, predicated upon a claimed tax liability on his part as alleged transferee of assets in the tax year of 1956. Subsequently, on November 3, 1965 an order was signed by Judge RAUM which "ordered and decided that there is no liability due from [Mr. Abrams] the petitioner." The Government consented to the entry of that order notwithstanding it had caused the foregoing enormous assessments to be levied against petitioner.

(1941); *United States* v. *Kendrick*, 331 F. 2d 110 (4 Cir. 1964). Moreover, neither Revenue Agent Blacher nor the two reviewers who approved his reports, Agents Gellens and Denkenson, nor the District Director who passed upon the refunds, have ever stated that the findings concededly made by Blacher that "there was no tax due for 1952" and that there was "no substantial understatement of taxes and no fraudulent conduct on the part of petitioner" (Govt. Mem. pp. 6, 3) were wrong.

Suppression of Relevant IRS Files

Several other points in the Government's memorandum require, to say the least, some clarification. The Government contends that petitioner "cannot now complain" that files of IRS relating to the supplemental audits and petitioner's refund claims were not made available to him in the District Court (Mem. p. 8), because petitioner's counsel stated that he wanted the files placed in the possession of the Court and not in his possession. The Government's argument is disingenuous. The files referred to were subpoenaed by petitioner (79a-82a). On the return of the motion, the Government contended that petitioner had not shown that the subpoenaed materials were relevant to his application, nor that they could not be obtained elsewhere (44a), although it conceded that the files included "work papers" relating to the audits of petitioner's returns (41a) and "work papers and records of agents" relating to the official IRS acknowledgments that petitioner's returns as "originally filed were correct" (42a). Petitioner disclaimed intent to rummage indiscriminately through IRS files and suggested that in the first instance they be placed in the possession of the Court so that it might see that the official notifications received by petitioner were necessarily and "deliberately done after the most careful investigation" and were fully supported by work sheets and other

factual data (34a).* The District Court received the subpoenaed files with the avowed purpose of determining whether anything "exculpatory" of petitioner was contained therein (54a-55a) and specifically noted that it was the Court's "function" and "responsibility" to look at those files (55a). Nevertheless, as the correspondence between petitioner's counsel and the Court made clear, *the subpoenaed files were not considered at all by the Court in dismissing petitioner's application* (127a-132a; see Pet., pp. 20-22).

Petitioner did not cease his efforts to obtain access to the subpoenaed materials when they were placed in the Court's possession (106a). Even after the decision counsel implored the court to grant petitioner access to the files on which the Court's decision *appeared* to be based until it was made clear that the files had not been considered at all (127a-132a). In fact, petitioner submitted a proposed counter-order, which was not signed, which would have directed that the files "remain in custody of the Clerk of this Court pending applicant's appeal from this order, so that said file may be made available upon the submission and argument of said appeal, or until the time to appeal from this order has expired" (135a). On the basis of this record, the Government's contention that we have waived our objection to the failure to produce subpoenaed IRS files is entirely without merit. We sought and still seek to examine the files and place them before the Court pre-

---

* Counsel said to the Court:

> "But we felt that in an important application of this kind, in order to show that the conclusion that the Government reached in these formal documents was not the result of error, not the result of haste, not the result of some other considerations that had nothing to do with the merits, we wanted to have before your Honor on this rather important application the basic documents which will show that the Government reached this conclusion after following, every conceivable procedural step which it was necessary to take, and the few documents that they have would show that." (29a-30a)

cisely to overcome the objection of the Government in its Memorandum that the IRS official acknowledgments of "no tax due" were based on "insufficient" documentation.

The Guilty Pleas

The Government further contends that petitioner, by his guilty pleas, admitted "that he had evaded a *substantial* amount of taxes" and that "there is nothing in the record to support petitioner's assertion that he was forced to plead guilty because the circumstances prevented adequate preparation for trial" (Mem., pp. 2, 5). Under the circumstances of petitioner's incarceration at the time the pleas were entered, which is fully detailed in the affidavits below (59a-61a), it is quite clear that petitioner was not able to exercise "that free will essential to a reasonable choice" which a plea of guilty must represent if the conviction entered thereon is to be legitimate. *United States* v. *Tateo,* 214 F. Supp. 560, 565 (S.D. N.Y. 1963). The fact that it took petitioner some three years after his release to gather the records necessary for his exoneration (61a-62a), and the great complexity of this task (103a-104a), clearly evidences the impossibility of preparing, while in prison, an adequate defense to these indictments which charged petitioner with evading personal income taxes for the year 1951 of $241,660.15, and corporate income taxes for the same year of $488,048.31, and with evading personal and corporate income taxes respectively of $29,374.04 and $3,954.71 for the year 1952 (139a-142a);* so too does the fact that it took the Government some three years after that to acknowledge officially that "the tax returns as originally filed were correct" (Exh. opp. 64a) and to pay to petitioner the cash refunds due him. So too does the fact that the Government had and may still have in its possession corporate records

* Indeed, at the very time of sentence the District Court recognized that there existed a genuine dispute as to the amount of tax claimed (59a-61a).

necessary to defend against the tax charges (60a, 104a), some of which were turned over to petitioner as late as March, 1965, pursuant to order of MISHLER, D.J., in a civil case in the Eastern District of New York.

The Government implies that petitioner pleaded guilty to evading taxes for the year 1952 in exchange for a dismissal of those counts of the indictments which charged evasion of personal and corporate income taxes for the year 1951 (Mem. p. 6). It was exactly to avoid this claim that petitioner offered below to demonstrate, on the basis of official acknowledgments by IRS and the factual data upon which such acknowledgments were based, that for the year 1951 as well "the tax returns as originally filed were correct" (Exh. opp. 64a). Although petitioner sought to convince the Court that the guilty pleas were not made in order to avoid prosecution for another tax year also named in the indictments, and sought vindication as to that tax year as well (12a-15a), the District Court ruled that it would not "hear anything relating to the 1951 returns" (15a). Government counsel's objection below that 1951 was "irrelevant" (42a), and the District Court ruling prevented petitioner from establishing the very thing it is now claimed is lacking in petitioner's presentation.

Petitioner's Prior Conviction

Although not explicitly offered as a ground for denial of this petition, nevertheless, the Government makes frequent reference to the fact of petitioner's prior conviction. This diversionary tactic, apparently successful below (see Pet.'s Appendix, p. 32, n. 1), is readily overcome and should in fact be decried.*

---

* In the words of Judge JEROME FRANK:

> "Succumbing to the temptation to consider other defeats suffered by a party may lead a court astray; see, e.g., *Southern Pacific Co.* v. *Bogert*, 250 U.S. 483, 489, 39 S. Ct. 533, 63 L. Ed. 1099, note 1." *Arnstein* v. *Porter*, 154 F. 2d 464, 475 (2 Cir, 1946)

We must note that a *coram nobis* application is being prepared in respect of the foregoing conviction on the basis of newly discovered evidence which had been suppressed at trial by the Government and we invite attention to the following facts: the case of *United States* v. *Fabric Garment Co.*; 262 F. 2d 631 (1 Cir. 1958), cert. denied 359 U.S. 989 (1959), involved the manufacture of Eisenhower jackets under four Government contracts entered into on January 5, March 10, December 3 and December 28 of 1951. The amount of Government cloth totalled some 719,000 yards. From this cloth 454,814 Eisenhower jackets were delivered, and *at no time did the Government claim any failure to deliver jackets in quantity, quality or workmanship as called for under the contracts.** Criminal conviction was predicated upon failure to comply with the contractual commitments for the return of the goods and parts or pieces thereof in all its altered forms not used in the production of the Eisenhower jackets made and delivered. The Government later conceded, during the course of a civil action involving the same matters, that it could not prove "how much was scrap and how much was yardage" of the material which it claimed was not returned.**

One crucial issue in the criminal case, of course, was whether there were any bolts of cloth, or for that matter

---

* In a subsequent civil case involving the same matters in the Eastern District of New York, Judge MISHLER noted:

"Fabric received 578,147 yards of 55" cloth and 141,336 yards of 56" cloth [total of 719,483 yards]. The cloth was first quality wool serge and in good condition, except for certain mill defects in parts of the bolts, to which reference will be made.

Fabric performed services on the cloth pursuant to the contracts aforementioned and delivered 454,814 Eisenhower jackets to the Agency."

** "The Court: Well, let me say this: I deem this as the critical part in the Government's case because Mr. Golden indicated that they could not prove how much was scrap and how much was yardage, if indeed they could prove a conversion at all. Am I correct in that Mr. Golden?

Mr. Golden: I don't think I can establish how much was scrap.

The Court: That's right; this is the difficulty."

any usable yardage at all, which remained after filling the Government orders. In view of the foregoing admissions made by the Government on the trial of the civil case, the validity and legitimacy of the prior conviction so frequently noted by the Government here is seriously called into question. Similarly, developments in the civil action cast grave doubt upon crucial Government testimony at the criminal trial, where cloth was exhibited which was claimed to have been Government goods which were sold by petitioner. During pre-trial examinations had in the civil action, it was indisputably shown that this cloth was 58" in width and not 56", the maximum width of the cloth claimed to have been delivered to petitioner and "stolen" by him. On his examination before trial FBI Agent Mulderig refused to measure the allegedly stolen Government cloth with a Government ruler, which cloth, when measured by petitioner in the presence of that FBI Agent and Government counsel proved to be at least 2" wider than any cloth claimed to have been delivered to petitioner.*

The Petition Was Timely

The Government complains that both the instant petition and the appeal below were untimely (Mem., p. 4); this objection is without merit. An application for a writ of error *coram nobis* is an "independent civil suit". See *Heflin* v. *United States*, 358 U.S. 415, 418, n. 7 (1959). This applica-

---

* The record of the examination of FBI Agent Mulderig shows as follows:

"Q. Did you measure the goods, these exhibits, to ascertain whether they fell within the width specified, as you have indicated, between fifty-five and fifty-six inches?

MR. MELTZER: You are asking Mr. Mulderig?

MR. GOTTLIEB: Yes.

A. No, I did not.

* * *

"Q. Now I want to know: Here is this piece of goods that according to the exhibit number has remained in your possession since January 1953. Have you ever taken the trouble to measure its width? A. No, I have not.

Q. Not up until this time? A. Not this time either.

tion, brought some four years after entry of the judgments sought to be vacated, was treated below as an independent *civil proceeding* from the outset—by the Government and the courts as well as by petitioner. This matter was called on the *Civil Calendar* of the United States District Court for the Eastern District of New York (4a) and was assigned its own *civil docket number* (1a). Indeed, the District Court found that reference to Rules 32(d) and 35 of the Federal Rules of Criminal Procedure in petitioner's motion papers was "incorrect" (119a; Pet.'s Appendix, p. 35).

Q. So you are not in a position to dispute that it is fifty-eight inches wide, are you? A. I am not in a position to state what width it is.

Q. *Do you want, as a matter of simple justice, to use a ruler and find out what its width is right here and now?* A. *No, I don't.*

* * *

"MR. GOTTLIEB: I have a right to ask the witness to take the measurement.

MR. MELTZER: Again, I am directing him not to do it.

MR. GOTTLIEB: Mr. Abrams, will you be good enough to take a ruler, right in the presence of these gentlemen, and measure this, the ruler supplied by Mr. Meltzer's office. Do you have any objection to my using your ruler, or do you claim it is inaccurate?

MR. MELTZER: If you want to represent that this is fifty-eight inches wide, that is all right.

MR. GOTTLIEB: I don't want to represent. I want the ruler to indicate whether it is or it isn't. Let us take the first exhibit.

MR. ABRAMS: (After making measurement) It is the width of the desk plus seven and a half inches.

MR. GOTTLIEB: Now, please measure the width of the desk. The spreading of the goods indicates that it is nine and a half inches less than the width of your desk, Mr. Meltzer.

MR. MELTZER: Mr. Gottlieb, if my desk has to appear in court, it will have to be your agent or employee who will bring it down.

MR. GOTTLIEB: The width of the desk is sixty-seven and a half inches wide, and nine and a half inches from that is fifty-eight inches. That is R-2. R-1 shows eight and a half inches less than the width of the desk or, as we calculate it to be, a width of approximately fifty-nine inches. These measurements, Mr. Meltzer, are subject to your verification with a tape measure, and there can be, I am certain, no dispute between us as to what the physical measurements are."

The docket entries reveal that the order of the District Court denying petitioner's application to set aside judgments of conviction was filed on January 22, 1965 and that petitioner's Notice of Appeal was filed on March 19, 1965 (3a), within the 60 day period provided by Rule 73(a) of the Federal Rules of Civil Procedure for actions in which the United States is a party. No objection was raised by the Government to the timeliness of the appeal below, nor did the court below find the appeal untimely, but went to the merits as it was required to do. See *Hixon* v. *United States*, 268 F. 2d 667 (10 Cir. 1959); *United States* v. *Scarlata*, 214 F. 2d 807 (3 Cir. 1954).

In this Court the provisions of 28 U.S.C. §2101(c) govern; the petition was filed well within 90 days of entry of judgment below as provided in that rule.* As was said in *United States* v. *Morgan*, 346 U.S. 502, 505 (1954) "* * * Federal courts should act in doing justice if the record makes plain a right to relief."

Petitioner's application for certiorari should be granted.

Respectfully submitted,

SAMUEL GOTTLIEB
LOUIS A. TEPPER
Attorneys for Petitioner
122 East 42nd Street
New York, N. Y. 10017

O. JOHN ROGGE
777 Third Avenue
New York, N. Y. 10017
Of Counsel

---

* The Government's complaint comes with rather poor grace after it had sought and received from petitioner consent to two 30 day extensions of time in which to file its answering memorandum.